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ABATEMENT.

An action by the father for the seduction of his daughter abates by his death and cannot be revived by his executors. *McClure v. Miller*, 133.

ADMINISTRATORS. *Vide* Executors and Administrators.

ADVANCEMENT. *Vide* Construction, 2.

ASSIGNMENT. *Vide* Chose in Action, 1.

ASSAULT AND BATTERY. *Vide* Indictment, 1.

AFFRAY. *Vide* Indictment, 1.

ALIEN. *Vide* Jury, 1.

BAIL BOND.

1. A sheriff may, but he is not *bound to*, insist upon two sureties to a bail bond. If he take but one, and he is *insufficient*, the plaintiff may except; but the bond with but one is good, either on *sci. fa.* or in an action of debt. *Arrenton v. Jordan*, 98.

2. An assignment of the bail bond by the sheriff to the plaintiff is not required when the suit is in the county court. Section 17 of the act of 1777 is confined to the Superior Courts. *Ibid.*

3. In a *sci. fa.* against bail it is not necessary to state the issuing and return of a *ca. sa.* against the principal, though the want of such *ca. sa.* would be a defense for the bail. *Ibid.*

BASTARD.

1. Upon the construction of ch. 985, sec. 2, Laws of 1818, N. R., against a mother for concealing the death of her bastard child: *Held*, by a majority of the Court, that the *corpus delicti* is concealing the death of a being upon whom the crime of murder could have been committed; therefore, if the child is *born* dead, no concealment is an offense against the statute. *S. v. Joiner*, 350.

2. It is not incumbent on the prosecution to show that the child was born alive, but the burden of showing the contrary is on the accused. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A note not assignable within the statute cannot be declared on. The consideration must be stated and proved. The note can only be evidence to the jury. *Stamps v. Graves*, 102.

2. Where a note is made payable on a contingency, and the contingency is of such kind as shows no benefit to the one or injury to the other party, the note of itself is no evidence of a consideration, but proof of a consideration must be given independent of the note. *Ibid.*

BOUNDARY.

What are the termini or boundary of a deed is matter of law; *where* these termini are is matter of fact. The court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance are also given, the former are the termini and the latter merely pointers or guides to it; and, therefore, where the natural object called for is unique, or has properties peculiar to itself, course and distance are disregarded; but where there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object; for in such case they do not control a natural boundary, but only serve to explain a latent ambiguity. *Tatem v. Paine*, 64.

Vide Evidence, 6.

CHOSE IN ACTION.

A vendee or assignee cannot sue in his own name for property which the vendor or assignor, at the time of sale, could only recover by a suit. *Stedman v. Reddick*, 29.

CLERK.

Under the act of 1823, for the promotion of agriculture, the clerk proceeded against for not making a return may make his excuse to the judge of the Superior Court, and on the sufficiency of such excuse the judge of the Superior Court will decide in his discretion. This Court will not revise the exercise of such discretionary power. *S. v. Sanders*, 198.

CONSIDERATION. *Vide* Bills of Exchange, 1, 2; Contract, 1.

CONSOLIDATION. *Vide* Practice, 4.

CONSTABLE'S SURETIES.

If a constable sue out a warrant, obtain judgment thereon, and receive the amount thereof from the defendant, *without an execution*, and fail to pay over to the plaintiff the amount received, the securities of the constable are liable to the plaintiff, notwithstanding he received the money without having an execution. *Holcomb v. Franklin*, 274.

CONTRACT.

The compromise of a doubtful right is a sufficient foundation for an agreement. *Truitt v. Chaplin*, 178.

Vide Evidence, 7.

CONTRIBUTION.

1. Contribution among cosureties was originally founded on the maxim that "Equality is equity" among those who stand in the same situation. This maxim can only be applied to those whose situations are equal; otherwise, equality is not equity; and hence, if one surety stipulate for a separate indemnity, the equality of situation between him and his cosurety ceases, and the maxim does not apply. *Moore v. Moore*, 358.

CONTRIBUTION—*Continued.*

2. The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in *fraud* or for the benefit of the other. Hence, if one surety, for his own benefit, *fairly* take an indemnity, he may use it until indemnified. If a surplus remain, in such case the other sureties may have the benefit of it. *Ibid.*

CONSTRUCTION.

1. B. W., having several children, to the elder of whom he had made considerable advancements, made his will, and after devising and bequeathing real and personal estate to his wife and to his younger children, and confirming the advancements made to the elder, directed the residue of his estate, real and personal, to be sold and the proceeds "to be divided among all his *heirs*, according to the statute of distribution of intestates' estates." *Held*, the word "heirs," as here used, means heir *quoad* the property, and not "children," "next of kin," or "heirs at law." By it is to be understood those whom the law appoints to succeed beneficially to the property in question. The whole of the property here is personalty, for the land, being directed to be sold and the proceeds divided, is regarded in this Court as personalty. Therefore, the widow of the testator is entitled under that term—she being by law appointed to succeed to personal property as well as the children, all claiming under the same statute. *Croom v. Herring*, 393.

2. The surplus mentioned in this clause is to be divided among those entitled, without any reference to the advancements or property bequeathed by other clauses. *Ibid.*

Vide Devise, 1.

COVENANT. *Vide* Warranty, 1.

DEVISE.

A. devises lands to J. W. and his wife during their lives, and to the longest liver of them, and also bequeaths to them certain slaves, etc., for their lives as aforesaid; and after their decease he gives said property, real and personal, unto the heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever. J. W. and wife are tenants for life only, and the heirs of their bodies take an estate in fee in the lands in remainder as purchasers; the remainder is contingent, and on the decease of the surviving donee for life, vests in such persons as are heirs of the bodies of J. W. and wife. A child, therefore, of J. W. and wife, who dies in the lifetime of the surviving donee, had no estate in the lands. According to the intent of the testator, the personal property, on the decease of the surviving donee for life, goes over with the lands to the remaindermen; the heirs of the body of J. W. and wife take an absolute property in the personalty on the decease of the surviving donee for life, and the executor or assignee of a child of J. W. and wife, dying before the wife, has no interest in the personalty. *Jarvis v. Wyatt*, 227.

EJECTMENT. *Vide* Boundary, 1.

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EMANCIPATION.

A testator by will directed his slaves to be liberated whenever the laws of the State would tolerate it, and that until that time the slaves should be divided among his wife and children according to the statutes of distribution. Eight years after the probate of the will, and after the slaves had been delivered over to the wife and children in a course of distribution, the executor filed a petition to emancipate one of the slaves, and set forth meritorious services. *Held*, that as the testator had not given it in trust to the executor to see to the emancipation of the slaves at any indefinite period of time, and as they had been delivered over to the wife and children by the executor, the trust ceased in the executor, and he had no authority under the will to file the petition; and the facts all appearing on the face of the petition, it was dismissed. *Pride v. Pulliam*, 49.

EQUITY.

1. A father, by deed, gave a negro to his daughter, and provided in it that if she should die without children the slave should return to his family. The deed was put into the father's possession to be recorded, and afterwards, before it was recorded, the daughter, by parol, relinquished all claim under the deed, and exonerated her father from all obligation to have it registered, and authorized him to destroy it. She afterwards married and died. Her husband filed this bill to set up the conveyance. *Held*, that after the daughter's voluntary renunciation, she would not have been entitled to the aid of the court to set up the conveyance; and that the husband, succeeding to her rights, could claim nothing more than she could. *Fordham v. Miller*, 219.

2. Independent of this objection, whether the court would set up this conveyance for the husband's benefit, thus giving it a different operation from what the parties intended, *quere*. *Ibid.*

3. Where a cause stands more than two terms upon replication, and the usual order for commissions, it is regular to set it down for hearing; and where no steps are taken to prepare the cause for trial, the suit may be dismissed for want of prosecution; but the plaintiff may, if he please, have the cause set for hearing on bill and answer, or may have it heard; therefore, when the judge below refused both, and dismissed the bill without hearing, such dismission was held to be erroneous. *Holmes v. Williams*, 371.

4. The bill alleged a certain sum received by the defendant, larger than that charged in the stated account. The defendant, in her answer, stated that her faculties were impaired by age and infirmities, and after so great a length of time since the transaction (about forty years) she could not speak with certainty to the matters charged in the bill, and said, in answer to the particular error, that she *believed* the sum charged in the stated account to be the true one, and did "*expressly aver* that to be the sum she received from her attorney, J. N., and no other." The attorney, in his deposition, swore that he paid her the larger sum: *Held*, that the charge was sufficiently denied to bring the case within the rule that a decree will not be made against a positive denial, on the unsupported testimony of a single witness. *Bruce v. Child*, 372.

EQUITY—*Continued.*

5. When a thing already exists which is alleged to be a nuisance, it may be a question whether this Court will interfere by injunction, before a trial at law establishing the fact of nuisance; but where the object of the bill is to *prevent* the erection of that which will be productive of injury, serious and irreparable, if erected, this Court will pass upon the question and interpose its authority to avert the threatened injury, for the matter cannot be tried at law, and should this Court refuse its aid, there would be no remedy. *Attorney-General v. Blount*, 284.

6. Where a decree was directed by the Supreme Court (the case being then in the court below), and entered in the court below, and the decree having been enrolled, a bill of review was exhibited, and a decree thereupon pronounced in the court below, from which an appeal was taken to this Court. It being objected here that the decree complained of was a decree of this Court, or at least decrees directed by this Court to be made below, and that neither a petition to rehear nor a bill to review could be entertained by the court below: *Held*, by two judges, that the decrees were decrees of the court below, and, as such, examinable by bill or petition below, whether they were pronounced by the judge upon his own opinion or upon conference with the other judges. *Griffin v. Griffin*, 403.

7. In the court below an order of publication as to J. C., an absent defendant, and afterwards an order setting the cause down for hearing and removing it to this Court. It did not appear from anything in the transcript that the publication had been made or a *pro confesso* taken. *Held*, that setting the cause for hearing was irregular. This Court can take cognizance of a cause removed only after it is set for hearing below. An irregular order setting the cause down for hearing is equivalent to no order; therefore, this Court cannot proceed. *Brachen v. Colquhoun*, 410.

Vide Execution, 4.

ESTOPPEL.

The sovereign power cannot be estopped. Where the crown, in 1768, granted lands to A. which it had previously granted to Earl Granville, the grant in 1768 was void; and as the State succeeded upon the revolution to Earl Granville's right to the land, a grant made by the State since shall be preferred to the royal grant in 1768. *Taylor v. Shufford*, 116.

EVIDENCE.

1. Before parol evidence can be given of the contents of a paper alleged to be lost, such loss must be satisfactorily shown. The *declarations* of the administrator to the person into whose possession the paper was last traced, that he could not find the paper among those of his intestate, is not sufficient proof of the loss, where the administrator is living, and there is no obstacle to procuring his testimony. *Allen v. Barkley*, 20.

2. Parol evidence shall not be received to contradict an acknowledgment in a deed of the payment of the purchase money. *Spiers v. Clay*, 22.

EVIDENCE—*Continued.*

3. The record of a recovery against a *guardian* is not evidence against his *securities*, in an action brought by the plaintiff in that recovery against the securities, to subject them upon the guardian bond for the default of their principal. *McKellar v. Bowell*, 34.

4. The record of a recovery by the creditor of an intestate against his administrator is not evidence in a suit by the creditor against the securities of the administrator. *Chairman v. Clark*, 43.

5. A discharge by a magistrate upon a warrant for a felony is *prima facie* evidence of the want of probable cause in an action brought by the defendant against the prosecutor for a malicious prosecution. In such action the defendant may give in evidence, in mitigation of damages, that after the prosecution instituted by him, the character of the plaintiff was bad upon subjects unconnected with the felony for which he was prosecuted. *Bostic v. Rutherford*, 83.

6. Common reputation is evidence in questions of boundary; and in ascertaining Earl Granville's line astronomical observation is a more certain mode (the latitude of the line being given) than an actual running of the line from a certain point designated on the seashore as its beginning. *Taylor v. Shufford*, 116.

7. Where a lawsuit is pending between two parties relative to the title of a vessel, and they enter into a parol agreement to settle all lawsuits and matters in controversy between them; and afterwards the plaintiff in the lawsuit, instead of dismissing it, takes a judgment by default, and is thereupon sued on his breach of the contract of settlement, in such suit either party may introduce parol evidence to show how his rights, as to the vessel, stood at the time of making the contract of settlement, because by so doing it would more satisfactorily appear whether those rights were taken into consideration in making the settlement. *Truitt v. Chaplin*, 178.

8. Proof of the handwriting of a subscribing witness, under a *temporary* absence of the witness without a change of domicile, shall not be received, for it might lead to great abuses; but where a witness leaves the State in the exercise of a public duty (as in the case of a Member of Congress) all presumption of collusion is repelled, and his handwriting may be proved. *Selby v. Clark*, 265.

9. A justice of the peace of Granville County rendered a judgment in Franklin. In an action on the judgment this fact may be proved, and the justice is a competent witness. *Hamilton v. Wright*, 283.

10. A record cannot be *prima facie* evidence; where admissible at all, the fact which it affirms cannot be contradicted; where it affirms a fact *inter partes*, such affirmation is conclusive upon parties and privies; where it affirms a fact in a case where no one was a party, it is evidence of that fact as to all persons alike. Where a suit was brought against three justices of the peace by an infant for having appointed a guardian for him without taking any bond, the record of the county court was offered in evidence by plaintiff, showing that on a certain day of a certain term the court was opened, the defendants being on the bench as justices at the opening of the court, and various orders

EVIDENCE—*Continued.*

were entered on the record, among the rest, the appointment of the guardian to plaintiff. This record was offered as evidence that the defendants were the justices who made the appointment: *Held*, that it is not *prima facie* evidence of the fact; because a record, if evidence at all, is conclusive. It was evidence from which no inference of law is drawn, but it should have been left to the jury to draw from it the inference of fact that the defendants did make the appointment, if it would furnish them with any such inference. *Foster v. Dean*, 299.

11. A judgment obtained against a deceased person during his lifetime, and a second judgment obtained thereon against his administrator after his death, is both as to the administrator and his securities evidence of a debt due by the intestate; but it is not evidence against the securities that the administrator has or had *assets* to discharge it. But if the administrator has returned an inventory, such inventory is *prima facie* evidence against the securities of assets to that amount. *Chairman v. Harramond*, 339.

EXECUTION.

1. A levy on *chattels* vests in the sheriff a special property, and he may, therefore, sell after the return day of the writ, without a *ven. ex.*; but a levy on *land* gives to him neither property nor a right of possession; he has a naked authority to sell only; his sale transfers a right of property to the purchaser, and without the consent of the tenant the sheriff cannot give actual possession. Therefore, a sale by a sheriff of real estate, after the return of a *fi. fa.* and without a new writ, is made without authority, and passes no title. It *seems* that a levy on real estate shown only by an indorsement on the writ, made after the return day, is not valid. *Barden v. McKinne*, 279.

2. The lien created by an execution is continued by an *alias* regularly issuing thereon; and if execution, at the instance of another plaintiff, issue after the lien of the first commenced, and before execution is fully done under it, the *alias* come to the sheriff's hands, it shall have the preference. *Brasfield v. Whitaker*, 309.

3. A. made a deed of trust to satisfy several creditors; after this, part of the property is levied on and sold under execution. The sale passes nothing. A. had not such an interest as could be levied on under our act of 1812, subjecting equitable interests to execution. *Brown v. Graves*, 342.

4. A. was indebted to B. and C. B. obtained a judgment against A., and before execution issued, a negro, the only property of A., was sold by a constable under an execution, when C. purchased him for $396, whereof he paid the constable $18, the amount of his execution, and by consent of A. retained the balance of his bid to satisfy the debt which A. owed him as far as it was sufficient for that purpose. A bill filed by B. against A., C., and the constable was dismissed. B. had no lien on the negro, either in law or equity. *Selby v. Dixon*, 424.

EXECUTORS AND ADMINISTRATORS.

1. When the plaintiffs in execution are administrators, who after a levy by the sheriff suspended the proceedings under the execution, and subsequently received the money from the defendant without any sale by the sheriff, they are liable to the sheriff in an action for his commissions *individually* and not as *administrators*. *Matlock v. Gray*, 1.

2. A purchase by an administrator inures solely to the benefit of the next of kin, and the slave purchased remains in the hands of the administrator after the sale upon the same trust as before. One marrying an administratrix is trustee of the intestate's property in the same manner as his wife was, especially if he have notice that it was the property of the intestate. *Falls v. Torrance*, 412.

Vide Evidence, 11; Trust; Lapse of Time.

FALSE TOKENS.

Promissory notes are not public tokens of themselves; bank notes are. An indictment, therefore, for a cheat at common law by passing certain "promissory notes" as and for bank notes, without an averment that they resembled bank notes, cannot be sustained. *S. v. Patillo*, 348.

FRAUD. *Vide* Judgment, 1.

GRANT. *Vide* Estoppel, 1.

HEIRS. *Vide* Construction, 1; Partition, 1.

INDICTMENT.

Indictment against two for an affray in "mutually assaulting and fighting with each other." The defendants were found not guilty of an affray, but that the defendant A. was guilty of an assault and battery upon B., the other defendant. Judgment on the conviction for an assault and battery may be pronounced. *S. v. Allen*, 356.

Vide Bastard, 1, 2; False Tokens, 1; Justices, 1.

INJUNCTION.

An injunction granted upon the payment of the money, recovered at law, into the office of the master will not be dissolved simply because obtained more than four months after the rendition of the judgment at law. The object of the act of 1800 on the subject of obtaining injunctions was to prevent delay and hazard to creditors, and this is accomplished by the terms imposed. *Pugh v. Maer*, 362.

Vide Equity, 5.

JUDGE'S CHARGE.

The charge of a judge should be judged of by its general scope and spirit; hypercritical niceties are to be disregarded. When, therefore, in an action for an assault, the jury was told to imagine themselves placed in a situation similar to that of the plaintiff, and to give to the plaintiff such sum as they would be willing to take as a compensation for the injury, the language is not to be understood *literally*. It is to be considered as admonitory to the jury to regard not merely the wrong

JUDGE'S CHARGE—*Continued.*

sustained by the plaintiff, but the provocation he had given, the effect produced on him, the ability of defendant to make compensation, and to estimate the damages from a view of all the circumstances. *Paschall v. Williams*, 292.

JUDGMENT.

A judgment fraudulently confessed to cover the property of the debtor shall be postponed to a judgment obtained *bona fide* after such fraudulent confession. *Leroy v. Dickinson*, 223.

JURISDICTION.

Where iron was left with one for a certain purpose, who after using part retained the remainder to his own use, a warrant cannot be brought before a single magistrate to recover the value of the iron retained. The act allowing warrants "for specific articles, whether due by obligation, note, or assumpsit," does not embrace this case. Perjury cannot, therefore, be committed on the trial of the warrant before the magistrate. *S. v. Alexander*, 182.

JURY.

An alien is not entitled to a jury *de medietate linguæ* in North Carolina. *S. v. Antonio*, 200.

JUSTICES.

The justices of a county court are not obliged, by their own exertions, to build and repair jails; they are only bound to use such means for the accomplishment of that end as the law prescribes—*i. e.*, to lay a tax, appoint commissioners to contract, a treasurer of public buildings, etc.; and for an omission of one or all these acts *it seems* they may be indicted jointly as a body; but the indictment must charge which of the duties prescribed by the act has been neglected; it is not sufficient to charge generally that they negligently and unlawfully did permit the jail to go to ruin and decay. *S. v. Justices*, 194.

JUSTICES' JUDGMENT.

Justices' judgments are not records, and do not prove themselves; they resemble records in one particular, viz.: their merits are not examinable in an original suit, and assumpsit will not, therefore, lie on such judgments. *Hamilton v. Wright*, 283.

LANDS.

The injury arising to adjacent lands by the overflowing of a mill-pond is a tort; although the statute has given a new remedy for it, it has not altered its nature. *Wilson v. Myers*, 73.

LAPSE OF TIME.

1. When a bill is filed to surcharge and falsify an account stated nineteen years before, the delay must be well accounted for, to repel the presumption arising from this acquiescence. For this purpose it is not enough that the mistake sought to be rectified was discovered within a few months previous to exhibiting the bill, but it should appear why the discovery was not sooner made. *Bruce v. Child*, 372.

LAPSE OF TIME—*Continued.*

2. The claim of the next of kin to distribution of property purchased by the administrator at his own sale is not affected by the statute of limitations, being the case of a trust to which the statute has no application. In such case time is not a *bar*, but a circumstance from which a presumption may arise that the demand has been settled by payment or otherwise. A great lapse of time affords a strong presumption, but such presumption may be rebutted by facts explanatory of the delay, and though the court will not encourage claims brought forward after a great efflux of time, but will presume against them, yet where the delay is satisfactorily explained and the presumption of satisfaction sufficiently removed, the equity of the claimant remains unaffected, and the court will decree for him, notwithstanding the great lapse of time. *Falls v. Torrance*, 412.

3. In regard to time, equity acts by analogy to statute law or to common law, and time has the same effect as at law in the analogous case. Where the statute applies, *time* is a positive bar, may be pleaded, or is the ground of demurrer, and the right can only be saved by the same exceptions as at law have that effect. *Ibid.*

4. *It seems* that equities of redemption and constructive trusts are cases in which equity acts in analogy to the statute, and time should be a bar in itself, according to the recent decisions in England. But when the rule as to time was adopted in this State, in such cases, equity was supposed to act in analogy to the common law. Hence, the time adopted was twenty years, and hence, also, it was considered as only affording a presumption of fact, and not as a positive bar. Though this notion was incorrect, and properly seven years is the period and should be a bar, in analogy to our statute of limitations, yet the notion has been so long adopted—is supported by such a train of decisions, and so much property depends upon it—that it is now too late to disturb it. *Ibid.*

5. In cases of direct or pure trusts time has no influence. The estate of the trustee is that which supports the trust, and without which it could not exist, and his possession operates for the benefit of the *cestui que trust*. The trustee cannot, by any act of his, make his estate and possession adverse to the *cestui que trust*. The trust owes its existence to agreement, and it requires the consent of the parties to destroy it. Therefore, if the trustee be guilty of wrongful conduct, he does not cease thereby to be a trustee, and of the same kind of trust as before such conduct; but it is at the election of the *cestui que trust* to consider the trust at an end (if he please) and treat the trustee as a wrongdoer. *Ibid.*

LEGACY.

As to personal property, a residuary clause not only carries all not disposed of, but everything that in the event turns out not to be disposed of. *Taylor v. Lucas*, 215.

LEVY. *Vide* Execution, 1, 3.

LIEN.

The purchase money of land, unpaid, is a lien on the land where no conveyance has been made of it, unless there is evidence that the land

LIEN—*Continued.*

was not looked to, or such lien has been abandoned. When, therefore, A. purchased real estate, and a conveyance was to be made when the purchase money was paid, the vendor has a lien on the land for the purchase money; and A. having afterwards mortgaged the premises to B., and B. having paid the purchase money, he may *tack* the money paid to the sum due on the mortgage; for the payment is for A.'s benefit; it discharges the lien, and enables him to demand the legal title. *Henderson v. Stuart*, 256.

Vide Execution, 2, 4.

LIMITATION. *Vide* Warranty, 3; Lapse of Time; Pleas and Pleading, 1.

MALICIOUS PROSECUTION. *Vide* Evidence, 5.

MANSLAUGHTER.

Under the act of 1816, ch. 20, corporal punishment and imprisonment cannot both be inflicted on a person found guilty of manslaughter. *S. v. Yeates*, 187.

MILL-POND. *Vide* Lands, 1.

MORTGAGE.

Under ordinary circumstances the purchaser from a mortgagee stands in his place, and must submit to a redemption on the same terms; for though he may purchase for a large sum, and though he has the legal title, yet he has not equal equity with the mortgagor, for he buys *with notice;* his title being on its face for the security of money, should put him on inquiry; and anything which puts one on inquiry is sufficient notice. There are cases, however, where a different rule prevails, as where the purchaser advances the money and takes a conveyance for the benefit of the mortgagor or his heirs, and not for his own benefit. But as in this case the defendant took an *absolute conveyance* to himself, and in his answer *denied* complainant's *right to redeem*, he must be viewed as a mere assignee of the mortgagee, and must submit to a redemption on the same terms, and is not entitled to the sum which he has actually advanced. *Henderson v. Stuart*, 256.

NEW TRIAL.

1. Where upon a record and statement of the case sent to this Court it appears that the charge of the court was not applicable to the facts stated, a new trial must be granted; for if there was no other evidence but that stated, the charge was irrelevant; and if there was other evidence, it should form part of the case; and in either event a new trial will be granted. *Finch v. Elliot*, 61.

2. Where a judge below is correct in his statement of a rule of law, but makes a misapplication of it, and it is obvious, from the finding, that the jury were led into no mistake thereby, *it seems* that a new trial will not be granted because of such misapplication. *Tatem v. Paine*, 64.

3. If a release be offered in the course of a trial to render a witness competent, and is read without any objection made at the time as to the

NEW TRIAL—*Continued.*

want of proof of its execution by the subscribing witness, such objection shall not avail after verdict as a ground for a new trial. *Ibid.*

Vide Sheriff, 2.

NUISANCE. *Vide Equity*, 5.

PARDON.

The Governor cannot, constitutionally, add to or commute a punishment; but under the power of pardoning he may remit part of a fine. *S. v. Twitty*, 193.

PARTITION.

The act giving power to courts of equity to order sales of real estate for the purpose of partition directs the proceeds to which infants are entitled to be secured to such infant or his *real* representatives. Hence such share of the proceeds is to be considered as real estate, and (if the infant die before arriving at age) the heir at law will succeed to it, and not the personal representative. But if the infant arrive at full age and then die, whether the heir at law will be entitled, *quere*. *Heckstall v. Powell*, 216.

PERJURY. *Vide* Jurisdiction, 1.

PETITION FOR REHEARING. *Vide* Equity, 6.

PLEAS AND PLEADING.

1. To an action on a sheriff's bond the plea was, the act of 1810, barring suits on such bonds if not commenced within six years after the right of action accrues; replication, a promise within three years. The replication is a departure from the declaration; for though the party promising may be liable in an action on the promise, yet the promise cannot restore the right of action on the bond; for to that, by the express words of the statute, lapse of time is a positive bar. *Governor v. Hanrahan*, 44.

2. A variance between the writ and declaration, the former being in debt, the latter in assumpsit, is fatal even *after verdict*. *Stamps v. Graves*, 102.

3. It is not proper to permit a special plea to be added after the jury is impaneled. *Hamilton v. Wright*, 283.

Vide Bills of Exchange, 1; Lands, 1.

PRACTICE.

1. Laws 1824, ch. 3, giving to the Supreme Court the power of amending, extends only to such amendments as the court below might have made; and *it seems* no *substantial* amendment will be allowed in the Supreme Court, because on such amendment the other party should have leave to amend his pleadings, and thus new issues are made which there is no tribunal to try. *Matlock v. Gray*, 1.

2. The distributees of A. filed a petition against the administrator of A. and charged in the petition that B., one of the children of A., had been advanced by his father in his lifetime, and made him a defend-

PRACTICE—*Continued.*

ant in the petition. In the county court a jury found that B. had been advanced. B. removed the proceedings by *certiorari* to the Superior Court, where, after reference to the clerk of the matters of account, the suit as to the petitioners was settled and disposed of; and so much of the case as related to the advancement of B. was referred to arbitrators, who decided that B. was entitled to receive a certain portion of his father's estate; and when this award was returned, on motion, judgment was rendered for the sum stated to be due, in favor of B. against the administrator, without objection: *Held*, that the circumstances under which the judgment was rendered were such as made the judgment substantially just, as much so as if B. had been one of the petitioners instead of a defendant; and as B. had issued a *sci. fa.* to the administrator on this judgment, if the administrator had any substantial plea he might urge it against the *sci. fa.* *Dozier v. Simmons*, 26.

3. A petition was filed against several defendants, complaining of an injury done to lands by a mill-pond; a trial was had and verdict taken for the petitioner, and judgment against all the defendants. One of the defendants was dead at the time of judgment, and a writ of error was brought for this error in fact. On the return of the writ a motion was made below to amend by suggestion of the death *nunc pro tunc*, etc. The motion was allowed on payment of costs, and the writ of error dismissed. On appeal to this Court, *Held*, that the amendment had been properly allowed, for it would have been at the trial a matter of course. *Wilson v. Myers*, 73.

4. Where a plaintiff sued out twenty-one warrants on twenty-one notes, amounting in all to $104, in cases where the causes of action were the same, and the defense was the same in all, the court compelled plaintiff to consolidate. *Person v. Bank*, 294.

Vide Injunction, 1; Pleas and Pleadings, 3; Equity, 3, 4, 6, 7; New Trial, 1, 2, 3; Sheriff, 2.

PROCESS.

A subpœna is good which is tested in a certain year of American Independence, though the year of our Lord is not named. *Goodman v. Armistead*, 19.

PUNISHMENT. *Vide* Manslaughter, 1.

RECORD. *Vide* Evidence, 10; Justices' Judgment, 1.

REMAINDER. *Vide* Devise, 1.

SHERIFF'S BOND. *Vide* Pleas and Pleadings, 1.

SHERIFF'S RETURN. *Vide* Sheriff, 2.

SHERIFF.

1. When a sheriff levies and advertises for sale, but, in consequence of the payment of the debt to the plaintiff by the defendant in execution, does not actually sell, he is nevertheless entitled to his commissions on the whole debt, under the act of 1784. *Matlock v. Gray*, 1.

SHERIFF—*Continued.*

2. The return of a sheriff of the service of a writ is made upon oath, and cannot be contradicted by the defendant's affidavit that the writ was not served. When, however, a defendant, against whom a judgment by default had been rendered obtained a *certiorari*, and swore that the writ had never been served, and *that he had a good defense*, the *certiorari* will not be dismissed, but a new trial shall be had. *Hunter v. Kirk*, 277.

SLANDER.

It is not actionable to charge a man with burning an outhouse not parcel of the dwelling-house. *Brady v. Wilson*, 93.

SUBPŒNA. *Vide* Process, 1.

TENANT IN TAIL. *Vide* Warranty, 2.

TRUST. *Vide* Execution, 3; Executor and Administrator, 2; Lapse of Time, 2, 3, 4, 5.

VARIANCE. *Vide* Pleas and Pleadings, 2.

WARRANTY.

1. These words are formed in a deed of *bargain and sale*, viz.: "Furthermore, I, the said M. H., for myself, my heirs, executors, and administrators, do covenant and engage the above demised premises to him, the said J. H., his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure, and defend." *It seems* that this is a *personal* covenant, and not a warranty. *Gilliam v. Jacocks*, 310.

2. M. H., the grantor in the deed, was tenant in tail, and supposing the clause above cited to be a warranty, still no discontinuance of the estate tail is worked by reason of such warranty occurring in a deed of bargain and sale; nor is the heir in tail put to her *formedon*. *Quere*, Can the writ of formedon be now brought? *Ibid.*

3. The first heir in tail after the death of M. H., the grantor in the foregoing deed, when the right devolved on him, was an infant, and died before the disability was removed, leaving an infant heir, who became covert before full age, and brought her action within three years after discoverture: she is not barred by the statute of limitations; she comes within the saving of the act. *Ibid.*

WILL.

1. A. executed a paper-writing in the form of a deed of trust, and afterwards, on the same day, made his will, referring to the former paper, the purpose of which was a distribution of his estate after death. D. Y. was one of the trustees named in the deed, and also one of executors named in the will, and one of the only two subscribing witnesses to both papers. The trustees were directed by the first instrument to retain out of the funds a compensation for their trouble. The testator had both real and personal property, which his trustees and executors were directed to sell. After the death of A., D. Y. released

WILL—*Continued.*

all his claim to the other trustees. Whether the two papers are to be considered as one testamentary disposition, *Quere. Allison v. Allison*, 141.

2. The will is not well executed. D. Y. had such an interest in the lands devised as was contemplated by the act of 1784, and when such interest exists at the time of attestation, no subsequent release will avail. *Ibid.*

Vide Construction, 1.

WITNESS.

The plaintiff was security for one G. The defendant, the administrator of the creditor, obtained judgments at law against the principal and surety in a joint action. Plaintiff filed his bill to be relieved against the judgment, on the ground that he was discharged in equity by the laches of the holder. G. is not a competent witness to prove the truth of plaintiff's bill. *Cannon v. Jones*, 368.

Vide Evidence, 2; Will, 1.

WRIT. *Vide* Sheriff, 9; Process, 1.

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